



Session # 7

From Conflict to Peace: Adjudication Practice in Germany



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ADR in Germany

Theory and Application

- **Civil Engineer by formation**
- **Since 2010: Adjudicator for FIDIC type contracts**
- **1993 to 2004: KfW: Technical Expert, First Vice President and Head of the then Technical Department**
- **1985 to 1986: Chief Technical Advisor of a Multinational River Basin Organisation in Thailand**
- **1976 to 1993: International Consulting Company**
- **1969 to 1976: Academic Teaching Hanover University**





Outline

- ▣ **Status quo concerning alternative dispute resolution in construction business in Germany**
- ▣ **ADR Potential in Germany**
- ▣ **ADR Application in Germany**





Status quo concerning dispute resolution in construction business in Germany

- ▣ **98,060 construction law cases decided in 2017 at different levels**
 - **53,750 at district courts (AG) ≤ EUR 5,000**
 - **31.223 + 5,347 at provincial courts (LG)**
 - **7,740 at higher regional courts (OLG)**
 - **0 (that year) at Federal High Court (BGH)**
- ▣ **1,750 cases of ADR of all kinds per year in 2014 + 2015**
 - **Mediation, conciliation, adjudication, arbitration**





Status quo concerning dispute resolution in construction business in Germany

▣ Average Duration of Construction Law Cases at Civil Courts

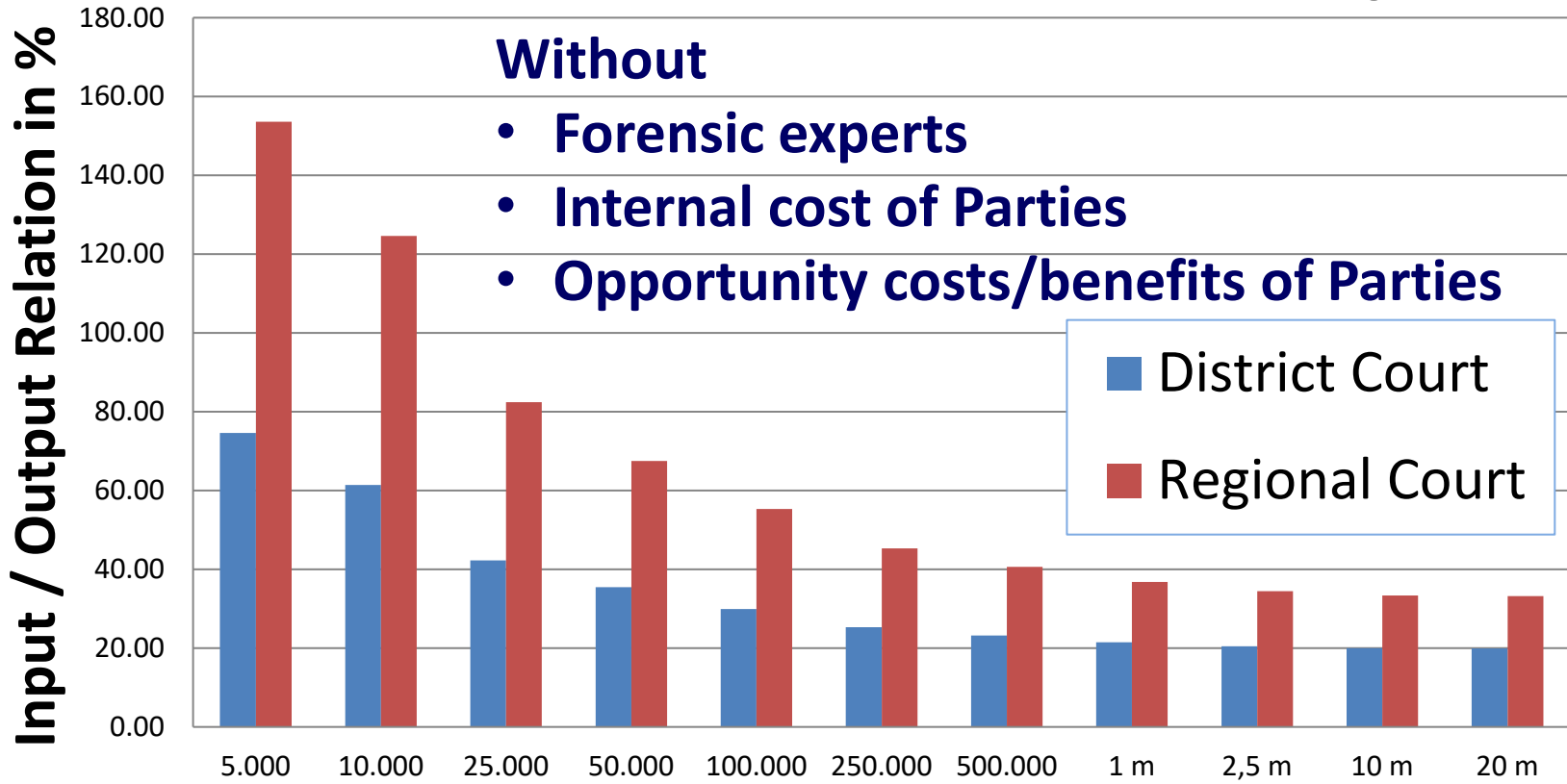
- District court: 8 months
- Provincial court: 2.1 years
- Higher Regional Court: 3 years

▣ And durations of 5 years are not really exceptional, in particular in cases of appeals



Status quo concerning dispute resolution in construction business in Germany

Procedural Cost vs Amount in Dispute



acc. to Sundermeier 2019

Amount of Dispute in EUR

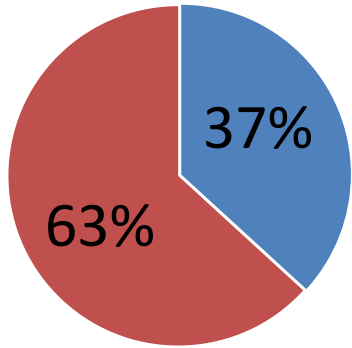




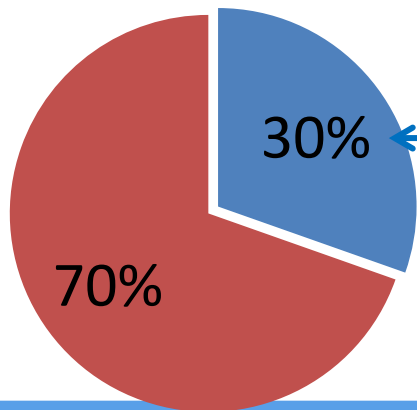
Status quo concerning dispute resolution in construction business in Germany

Practical Experiences with Construction Lawsuits

Employer



Contractor



too lengthy taking years for final decision

too expensive high costs for courts lawyers etc

consuming too many internal resources

too unpredictable in terms of final outcome

Who goes to court for a sheep will lose a cow. Spanish proverb
acc. to Sundermeier 2019

■ Satisfied ■ Not satisfied





ADR Procedures in Germany

VOB/B Procurement Procedure in the Construction Business, Edition 2012

- ▣ **Legally mandatory rules for all construction projects financed with public funds**

- ▣ **Paragraph 18 Dispute Resolution** says in
 - **(3) "Furthermore a procedure for dispute resolution can be agreed upon. The agreement should be concluded with the contract agreement."**





ADR Procedures in Germany

▣ **SL Bau Procedures for Construction Dispute Resolution** of the German Association of Construction Law DGfB July 2016

- **Mediation**
- **Conciliation**
- **Adjudication**
- **Arbitration**

▣ **DIS Code of Procedure for Conflict Management** of the German Institution for Adjudication / Arbitration, May 2010

- **Mediation**
- **Conciliation**
- **Adjudication**
- **Arbitration, March 2018**





ADR Procedures in Germany

- ▣ **SOBau Conciliation and Arbitration Procedures for Construction Disputes of the Working Group Construction Law of the German Lawyers Association, Sept. 2009**
 - **Conciliation**
 - **Arbitration**

- ▣ **AO-Bau Adjudication Procedures for construction Law Disputes of the German Association of Construction Law Professionals DBGTT, Jan. 2010**
 - **Recommendation to amend the German Construction Law by formally introducing ADR**





ADR Procedures in Germany

- ▣ **AHO Paper 37 Conflict Management in the Construction and Real Estate Industry of the Fees Committee of the Engineering Chambers, March 2018**
 - **Description of various ADR forms**
 - **Recommendation of procedures**
 - **Recommendation how to deal with ADR in case of projects with public participation**
 - **Information on fees**

- ▣ **Mediation Procedure of the Association of Conflict Management in the Construction and Real Estate Industry, Dec. 2012**

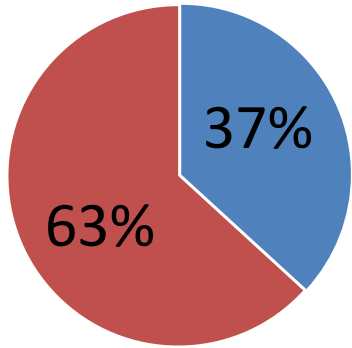




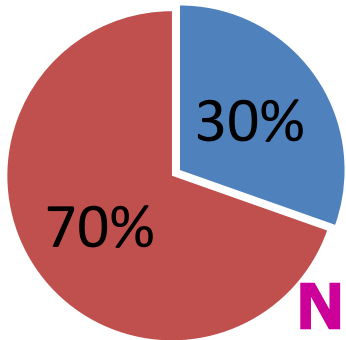
Status quo concerning dispute resolution in construction business in Germany

Practical Experiences with Construction Lawsuits

Employer



Contractor



■ Satisfied ■ Not satisfied



Now, when there ways to avoid lawsuits, **WHY ARE THEY NOT USED?**





NO ADR Procedures in Germany

Already a PwC study in 2005 suggested that the majority of the interviewees regarded ADR as advantageous – albeit without implementing it.

Some reasons found in that study

- ▣ Missing knowledge and experiences with ADR**
 - No willingness to change habits**

- ▣ Missing competence and cultural aspects with respect to handling disputes**
 - Pronounced perception of entitlement and of roles**
 - Personal motives and behavior patterns**
 - Tactical maneuvering within the conflict**





NO ADR Procedures in Germany

More Reasons for disregarding ADR

Systemic opposition in the organisation of the Parties

- **Internal structures and processes**
- **Personal position and reputation within the organisation**
- **Role of internal legal counselors**
- **Distinctive peculiarities in the context with public procurement**

Systemic oppositions within specific conflict situation

- **Multitude of stakeholders in the conflict**
- **Participation of insurance companies**



NO ADR Procedures in Germany

More Reasons for disregarding ADR

- ▣ **Role of external legal counselors**
 - **Economic incentives of external legal counselors**
 - **Legal education**
 - **Late (or too early ?) involvement of legal counselors**

- ▣ **Systemic advantages of lawsuits**
 - **High authority of the courts**
 - **Tactical considerations**





NO ADR Procedures in Germany

More Reasons for disregarding ADR

▣ My practical experience

- 1. German public procurement is driven by jurists, as most of the public administration**
- 2. This is increasingly true also for technical administrations where jurists occupy top ranks**
- 3. They are horrified to change their habits**
- 4. They do not trust anyone who is not a jurist, even in their own institution**





NO ADR Procedures in Germany

More Reasons for disregarding ADR

- ▣ **Formal legal reasons for rejecting ADR by public employers**
 - **No particular demanding ADR – VOB only says ADR can be agreed upon; it does not say "shall" or at least "may"**
 - **ADR in conflict federal and state budget laws**
 - **ADR in Conflict with Constitution, mainly the General Business Conditions (AGB)**

- ▣ **However, former Constitutional Judge Prof. H.-J. Papier denied these arguments in a legal opinion already in 2013**





ADR Procedures in Germany (!?)

There is Hope !

- ▣ **Federal Ministry for Transport and Digital Infrastructure in June 2015 published the final report of the "Reform Commission for the Construction of Large Projects"**
 - **several federal and state ministries**
 - **other public employers: railway and road authorities**
 - **representatives of contracting and consulting industry**
 - **lawyers, insurance industry**





ADR Procedures in Germany (!?)

There is Hope !

- ▣ **"Reform Commission for the Construction of Large Projects" suggested *"Extrajudicial Dispute Resolution"* = ADR**
 - *Employer should agree with project partners internal and external conflict resolution mechanisms*
 - *Public Authorities should remove legal restraints for external dispute resolution*
 - *Public Authorities should provide procedural rules for mediation and adjudication*





ADR Procedures in Germany (!?)

There is Hope !

- ▣ **Pilot projects with ADR under responsibility of Federal Ministry for Transport and Digital Infrastructure**
- ▣ **Some (few) public employers started to apply ADR on a regular basis, e.g. HPA Hamburg Port Authority**
- ▣ **KfW German Development Bank has made a DB mandatory for their projects**



Thank you for your attention

